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JUN 14 1996

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	]	
	]	GC Docket No. 96-55
Examination of Current Policy Concerning the Treatment of Confidential Information	]	

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF JAMES A. KAY, JR.

James A. Kay, Jr. ("Kay"), by his attorney and pursuant to Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(c), Section 1.415(a) of the Commission's Rules and Regulations, 47 C.F.R. § 1.415(a), hereby offers his comments on the *Notice of Inquiry and Notice of Proposed Rulemaking* (FCC 96-109; released March 25, 1996) in the captioned matter.

Kay is a Part 90 licensee, owning and operating, *inter alia*, numerous specialized mobile radio ("SMR") service facilities in and around the Los Angeles, California, metropolitan area. SMR, or "dispatch," is a fiercely competitive business, particularly in the Los Angeles area. As a result, licensees such as Kay are particularly concerned that their proprietary information does not find its way into the hands of their competitors. Concerns in this regard are heightened by the fact that Commission investigations of SMR and other Part 90 licensees are frequently prompted by informal communications and complaints from the competitors of the targeted licensee. Part 90 licensees are often called upon to provide competitively sensitive information to Commission staff, with the attendant risk that it may then become available to his competitors. Indeed, Kay is currently defending himself in a license revocation proceeding[1] in which allegations of improper treatment of confidential information on the part of Commission staff will be a substantial part of

[1] WT Docket No. 94-147. Kay necessarily discusses (at footnote 2, below) some of the events leading up to and resulting in the hearing as an example of the need for the implementation of his recommendations. These comments are exempt from ex parte prohibitions because they are "authorized by statute or by the Commission's Rules," 47 C.F.R. § 1.1204(b)(1), namely, provisions of the Administrative Procedure Act and of the Commission's Rules that expressly authorize comments in rulemaking proceedings. Nevertheless, out of an abundance of caution, Kay is serving trial counsel for the Wireless Telecommunications Bureau, the only other party in WT Docket No. 94-147, thereby removing this pleading from the scope of the definition of "ex parte presentation." 47 C.F.R. § 1.1202(b).

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Kay's defense. Kay is clearly a party with a direct interest in this matter and with meaningful and relevant information to provide as the Commission considers these important issues. [2]

Kay limits his comments to a relatively narrow aspect of this matter. Specifically, as the Commission undertakes its review of its policies, procedures, and regulations, applicable to the treatment of confidential information, Kay urges the adoption of three general principles, as follows: (1) protection of confidential information should be afforded universally in any and all

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[2] The concerns expressed herein are not merely theoretical, but arise out of Kay's first hand experience in dealing with Commission staff. In a letter dated January 31, 1994 (Attachment No. 1, hereto), Kay was asked, pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), to produce a large quantity of data, much of which Kay considered confidential and/or competitively sensitive. Although the requested ostensibly was part of an investigation of complaints, the Kay was not permitted to review the complaints or even to know who made them. (Kay has since learned that at least one of the complaints was a sham, having come from a nonexistent company, and almost certainly fabricated by one of Kay's fiercest enemies.) Suspicious that several of his competitors were trying to orchestrate a situation that would "get him in trouble" with the Commission, Kay was understandably reluctant to provide the requested information without strong and reliable assurances of confidentiality--assurances that Kay did not get from Commission staff.

While Commission staff paid some lip service to considering confidential treatment under various rule sections, Kay was not inclined to attribute sincerity to such statements because: (a) the staff had on at least one prior occasion disclosed financial information in a finder's preference adjudication, and (b) when Kay attached copyright notices to his responsive filings, Commission staff promptly requested that he submit fifty (50) copies of such information. (See Attachment No. 2). There is no rational basis for requesting 50 copies. In rulemaking proceedings, for example, when a party wishes each individual Commissioner to have a copy of its comments in addition to those provided to the staff, the Commission seeks only nine copies of the submission in addition to the original. See 47 C.F.R. § 1.415(b). Moreover, without conceding the point here, it is arguable that Commission staff would have been permitted, under the copyright doctrine of fair use, to make the limited number of copies needed for legitimate internal staff use. The request for 50 copies, however, only confirmed Kay's suspicions.

Through information obtained in FOIA requests and in discovery in both WT Docket No. 94-147 as well as civil litigation, Kay's suspicions have been vindicated. It turns out that the Commission staff, while refusing to disclose to Kay the source of the complaints against him, and without Kay's knowledge, had sent blind carbon copies of its Section 308(b) correspondence to Kay's competitors and enemies, and to the same people who were conspiring to arrange to get Kay in trouble with the FCC, to defame him to his customers, to interfere with his business, and to engage in various other vindictive acts. (See Attachment No. 3). Kay has even recently learned that some of these people have been in frequent contact with FCC, including numerous calls to the home of at least one FCC staff member. There is reason to suspect that, while Commission staff was refusing disclose the source of the complaints against Kay and refusing to provide Kay with meaningful assurances of confidentiality, it was surreptitiously disclosing the details of its investigation to Kay's competitors and enemies.

Kay intends to explore these matters fully (in WT Docket No. 94-147, if given the opportunity, or in an appropriate judicial forum, if not). It is not Kay's intention to litigate them here. Clearly, however, there was more than adequate basis in fact for Kay's reluctance to provide his private business information to Commission staff in these circumstances. Under current FCC practice, however, Kay's only recourse was apparently to find himself on the wrong end of a license revocation proceeding. Kay offers the suggestions made in these comments as a safeguard against this travesty of justice ever being repeated.

dealings with the Commission or its staff; (2) immediate and interlocutory reviews of delegated authority decisions and actions regarding confidentiality should be permitted; and (3) delegated authority decisions and actions regarding confidentiality should be reviewed by an independent entity that is fully separate from the delegated authority under review.

1. Universally Available Confidentiality Protection.

Private sector parties should be permitted to raise concerns regarding confidentiality and to invoke procedural protections against the disclosure of confidential information in any and all dealings with the Commission, regardless whether they involve formal proceedings. It should not matter whether the information is to be submitted in the context of a formal proceeding, *e.g.*, in a hearing or as part of an application or rulemaking, or a less formal matter, *e.g.*, an oral or written request by Commission staff for information. The general rule should be that any time a party is called upon to provide any information to the Commission for any reason whatsoever mechanisms for protection against the disclosure of confidential information are available.

Moreover, the initial determination as to the method of protection (*i.e.*, submission with request for confidentiality or request for protective order and/or other determination prior to submission) should be left to the discretion of the party submitting the confidential information. The level of protection required will depend both on the particular situation and the nature of the information involved. In some cases it may be adequate to submit the information, together with a request that it be withheld from public disclosure, while in other cases the party may desire assurance of confidential treatment prior to submission. In cases where information is particularly sensitive, provision should also be made for in camera review by a discrete and limited portion of Commission staff, rather than wholesale submission of the information. Parties should be permitted to request such treatment (in effect, a form of "protective order") from the same panel that would normally review confidentiality decisions of staff (see Sections 2 and 3, below).

Finally, if the information is being requested from a party who is under investigation, the Commission should fully disclose the purpose and nature of the investigation and the source of the Commission's concern. As noted earlier, such investigations often begin when a competitor of the target party informally complains or causes others to complain that the target party is

violating one or more rules or policies. Whether or not such complaints have any validity, the entire process can be used to obtain competitively sensitive information about the competitor. Commission staff seeks information from the target, and that information is then provided to the parties making the complaints, either informally or through FOIA requests. The party of whom the information is being requested must be advised of these matters in order to make a meaningful evaluation of the need for and level of confidential treatment.

2. Immediate and Interlocutory Review of Delegated Authority.

Regardless of the amount of initial discretion given to the party providing the information, the Commission will ultimately make the determination whether information will be afforded confidential status and, if so, the level of protection that will apply. Initial determinations in this regard are almost always made by Commission staff acting pursuant to delegated authority and in the context of a larger procedural matter. It is imperative that parties being asked to provide confidential information be given the right of immediate and interlocutory review of such confidentiality determinations and rulings by staff. When a party believes that it will be harmed by the vary act of providing proprietary competitively sensitive, or otherwise confidential information, a review of an order directing such production or disclosure will be meaningless if it is allowed only months or years after the information is already disclosed. The Commission can and should provide that, prior to being obligated to provide any information for which confidential treatment is requested, the party have a right to immediate and interlocutory review of any delegated authority decisions bearing on the confidentiality issues.

3. Independent Review of Delegated Authority.

The Commission should also take steps to assure that such review is truly independent of the delegated authority. Typical Commission practice for applications for review filed pursuant to Section 1.115 of the Rules is that the delegated authority under review takes an active and primary role in advising the Commission on review. Indeed, orders disposing of applications for review are usually drafted by the delegated authority whose action the Commission ostensibly is reviewing. Whatever the propriety of this procedure in the normal course, it is entirely unacceptable for the interlocutory review of delegated authority decisions on confidentiality.

When parties are being asked to provide confidential information that could then be obtained by competitors or other third parties, there will often be no way to remedy any resulting harm or injury after the fact. Pre-disclosure interlocutory review will not be meaningful if it is undertaken by the very staff members who made the determination in the first instance. The Commission should designate a portion of its staff that typically is not involved in confidentiality determinations, *e.g.*, the Office of General Counsel, to be primarily responsible for interlocutory review of confidentiality matters. The delegated authority under review should be treated as an adverse party with ex parte rules being fully applicable.

WHEREFORE, it is requested that the Commission give full consideration to these comments and adopt the proposals contained therein.

Respectfully submitted,

James A. Kay, Jr.

By: Robert J. Keller
His Attorney

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Dated: 14 June 1996

ATTACHMENT NO. 1

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

JAN 3 1 1994

In Reply Refer To:
Compliance File No. 94GQQ1

VIA REGULAR MAIL & CERTIFIED MAIL - RETURN RECEIPT REQUESTED

James A. Kay, Jr.
P.O. Box 7890
Van Nuys, CA 91409

Dear Mr. Kay:

The Commission has received complaints questioning the construction and operational status of a number of your licensed facilities. Specifically, the complaints allege that numerous facilities licensed to you are on U.S. Forest Service land, but do not have the requisite permits for such use. The presumption is that those facilities were not constructed and made operational as required by the Commission's rules and therefore, the licenses have canceled. In addition, the Commission has also received complaints questioning the actual loading and use of your facilities. The complaints allege that the licensed loading of the facilities does not realistically represent the actual loading of the facilities, thereby resulting in the warehousing of spectrum.

Based upon these allegations, we need more information to determine whether you are qualified to be a Commission licensee. We are authorized to request this information pursuant to the Communications Act of 1934, as amended, 47 U.S.C. Section 308(b). Failure to respond timely, completely, and truthfully could result in initiation of revocation proceedings against your licenses.

(1) List alphabetically the call signs and licensee names of all facilities owned or operated by you or by any companies under which you do business. Annotate those facilities which are located on U.S. Forest Service land.

(2) Provide for each call sign listed in (1), the original date of grant of the call sign, the date the licensed station was constructed and placed in operation, and the type of facility.

(3) Provide a copy of the U.S. Forest Service permit for those facilities constructed and made operational on U.S. Forest Service lands in order of the list of call signs in (1). The permit should clearly indicate when such use was authorized.

ATTACHMENT NO.

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

MAY 1 1 1994

VIA REGULAR AND CERTIFIED MAIL - RETURN RECEIPT REQUESTED

James A. Kay, Jr.
P.O. Box 7890
Van Nuys, California 91409

Re: Application Nos. 415060, 415243, 415255
628816 and 632210

Dear Mr. Kay:

The Commission needs more information in order to determine what action to take on the above referenced applications.

Specifically, the Commission requires answers to our letter to you dated January 31, 1994 (copy attached) which requested information to determine whether you are qualified to be a Commission licensee. We were authorized to request this information from you pursuant to § 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b).

Failure to provide the aforementioned response to my attention at the above-captioned address within fourteen (14) days from the date of this letter, will result in the dismissal without prejudice of the above applications.

Please note that if you claim copyright protection in your response, we require that you file 50 copies of your response by May 25, 1994, as well as a full justification of how the copyright laws apply, including statutory and case cites with your request.

Sincerely,

W. Riley Hollingsworth

W. Riley Hollingsworth
Deputy Chief, Licensing Division

cc: Dennis C. Brown, Esquire

(4) For those facilities which are authorized on U.S. Forest Service lands, but for which you do not hold a permit, please explain the reason why a permit has not been obtained.

(5) For each station shown in (1) include a user list. The list must include the user name, business address and phone number, and a contact person, along with the number of mobile units and, for trunked systems, the number of control stations, operated by the user. Users operating on multiple systems under (1) above should be annotated to identify all such systems and should be appropriately cross indexed.

(6) For each station in (1), please list the total number of units operated on each station. Such demonstration of use must be substantiated by business records.

Please send your reply to: Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245, Attention: Compliance - Room 41.

You are requested to furnish this information within 60 days of the date of this letter. Your attention is directed to Title 18, U.S.C. Section 1001, in which Congress has determined that a wilful false reply to a letter of this type may result in fine or imprisonment.

Sincerely,

W. Riley Hollingsworth

W. Riley Hollingsworth
Deputy Chief, Licensing Division

amw/kay12/rah

ATTACHMENT NO. 3

DECLARATION OF JAMES A. KAY, JR.

I, James A. Kay, Jr. declare that I am the Respondent in the above-entitled action. If called as a witness, I could competently testify to the facts contained herein. I make this declaration in response to the Bureau's latest Supplement to Motion for Summary Decision and Order Revoking Licenses, wherein it requested that all of my licenses except those supposedly in the name of Marc Sobel and in the name of Multiple M Enterprises, Inc. be revoked. This most recent pleading by the Bureau has muddied the waters to the point where a full, comprehensive explanation of the all the facts and circumstances leading up to the filing of the HDO is appropriate so that the Administrative Law Judge should have a full and complete record on which to rule.

In 1991, Harold Pick, a would-be competitor of mine, began an unceasing campaign of letters and complaints to the FCC Wireless Telecommunications Bureau, formerly Private Radio Bureau (Bureau), for the purpose of damaging my reputation. In addition, Mr. Pick engaged in a campaign of defamation against me with my customers, vendors, landlords, friends, other competitors, government agencies, Police Departments, and mutual acquaintances. I met with Pick in 1991 and told him to cease and desist his unlawful actions. He said he would do so, but in fact he did not. Throughout 1992, a running controversy continued with Pick. I would file applications for frequencies and Pick would file strike applications and strike protests. He was largely unsuccessful in his actions.

This history which follows is important, because it explains the genesis of the entire HDO. Also, informal pretrial discovery has revealed to me that **all** of the substantive complaints of wrongdoing alleged against me stem directly from complaints by Pick and his cohorts.

On July 24, 1992, at the Holiday Inn Crowne Plaza Hotel in Los Angeles, Pick arranged for a meeting with several of my competitors, the purpose of which was we believe, to enter into a civil conspiracy to attack my business interests in

every possible manner. See attached letter from Lewis Goldman, which documents the existence of this meeting. In August 1992, one of these individuals, Philip Gigliotti, sought to interfere with my agreement with Brown Ferris Industries (BFI) which had been made through a BFI employee named John Knight. This caused me severe difficulties at the Commission and the Commission ruled against me and later set aside one of my licenses. At the end of 1992, I instructed my attorneys to send a letter to Pick warning him not to defame me. Pick ignored the letter and continued his tortious conduct.

In April 1993, I completed a contract with Duke Pacific, Inc. through an employee named Greg Severson. To the best of my knowledge, Pick used the FCC database to identify Duke Pacific, Inc. as one of my customers. Pick subsequently called Severson and told him that I was a "thief, liar and murderer", all of which are untrue. As a result of Pick's allegations, Severson decided not to do business with either me or Pick, and decided to use cellular telephones instead. This loss of business, due directly to the breach of contract by Duke Pacific, cost me over $15,000. After the Duke incident, in August 1993, I sued Pick for slander and a variety of other torts. We understand that Gerard Pick, Harold Pick's father, went so far as to scream at a process server that I was a "murderer"! Harold Pick then enlisted the aid of a close friend of his (Frank DeMarzo) to assist him in his campaign against me. In particular, we believe they used the technique of instructing and encouraging customers to file untrue and defamatory accusations with the Commission. Customers were instructed not to serve copies of these complaints on me. Pick and DeMarzo assisted in the preparation of numerous letters and complaints to the Commission.

We understand that in September 1993, less than one month after Pick was served with the lawsuit, Frank DeMarzo, using FCC database records supplied by Pick, called upon a company called Cal Western Termite who had a contract with me. On DeMarzo's advice, Cal Western got counsel, who then filed accusations

against me before the Commission and sought reinstatement of a canceled license. Despite having made allegations of fraud and unlawful business practices against me before the FCC, Cal Western never filed any action in state court or brought any complaints before local authorities - the proper venue for such allegations stemming from contractual matters. As a result of his actions on behalf of Pick at Cal Western, DeMarzo was added as a defendant to the lawsuit which I had already commenced against Pick.

In December 1993, we understand that DeMarzo and Pick also successfully solicited complaints to be made against me from Cornelia and Charles Dray dba Chino Hills Patrol, Eddie Cooper of the Fullerton School District, Gary VanDeist, President of VanDeist Brothers, Inc. To the best of my knowledge, Pick repeatedly bragged to these people that they "had the goods on me" and that the FCC would put me out of business with their help and cooperation.

Pick even called John Poat, who was my Sales Manager, to gloat in a telephone call laced with obscenities, saying that "James Kay is going to get his, and so are you", and said that we were both "going on trial for our lives". I thus believed that complaints had once again been filed against me by Pick, but I did not know any of the specifics. I frankly wondered what false charges Pick was fabricating this time. On January 16, 1994, I filed Freedom of Information Act Requests (FOIAs) to discover what complaints had been filed against me, so that I might properly respond to them. I then received a letter from the Commission, dated January 31, 1994, commonly called a "308(b) letter". This is the letter which has been attached to the Bureau's moving papers. I sent this letter to my lawyers, BROWN & SCHWANINGER, for a response. I subsequently received from the Bureau a denial of my FOIA request. I became alarmed in February of 1994 when competitors told me that copies of the Bureau's January 31, 1994 letter were being distributed amongst the radio community and to my customers. This led me to conclude that I was the victim of "selective leaking" by the Bureau.

While the Bureau steadfastly refused to inform me of any of the specifics of any of the accusations against me, and denied my FOIA requests, I believe that they were inappropriately distributing to my competitors their investigative documents.

Moreover, the January 31, 1994 letter did not strike me as a true investigative tool. These concerns were expressed in my attorney's response to the Commission. I believed that the January 31, 1994 letter did not represent a true investigation, but was an attempt by the Bureau to secure my business list for distribution to my competitors. I instructed my attorney to request confidentiality for any records which I would provide. This is a request which I believed should have been routinely granted.

I was already very suspicious of the Bureau's intentions because the stated purpose of the letter was allegedly to determine the construction and loading of my stations. The letter requested only that I provide a current customer list for some date in 1994. **The information requested in the letter would neither have proven nor disproven whether or not my stations were constructed or loaded in years past.** In other words, the information requested could never have satisfied the stated purpose of the letter. This point was also argued by my attorneys in their Reply to the Commission. Therefore, I had to consider the real purpose of this letter. This was particularly true when my **attorney's request for confidentiality was twice denied by the Bureau.**

In an attempt to protect my customer list, my attorneys suggested that I copyright my answer. The Bureau's response to our statement that the customer list would be copyrighted was to demand **50 copies** of this highly confidential material. When I received the demand for 50 copies of my customer list, I had no doubts whatsoever and believed, that the real purpose of the January 31, 1994 letter was to obtain my customer list which, under advice of counsel, I believe was in serious risk of release to my competitors.

In the same time frame, specifically in April 1994, I had a Finder's Preference on file against a company called *Ralph Thompson dba Thompson Tree Services* (Thompson). Thompson's reply to the Finder's Preference filing revealed that Thompson was a customer who had been ill served by his previous equipment supplier and had simply discontinued use of his license. I was sympathetic towards his predicament that he would lose the ability to operate his radios. I contacted Thompson and offered my repeater services to him. He accepted and signed a contract. Several days later, Mrs. Thompson called me and informed me that she had received a telephone call from Anne Marie Wypijewski, who stated she was an attorney with the Federal Communications Commission. To the best of knowledge and belief, Ms. Wypijewski told Thompson that the Commission was going to delete Thompson's license from the database, and that Thompson could immediately refile for a new license, and that a week after the license had been deleted from the database, that my Finder's Preference would be dismissed.

I believed that Anne Marie Wypijewski was unfairly favoring one party in a license dispute, and under advice of counsel, came to believe that my rights were being deprived. This situation would be analogous to a Judge calling a litigant in secret and telling that person how judgment was going to be rendered against them and how to circumvent the consequences of the judgment. I believe that this action was deliberately directed against me due to the dispute involving the FOIA and the January 31, 1994 308 (b) letter. Upon advice of counsel, the decision was made to seek ironclad assurance of confidentiality. The Bureau steadfastly refused to deliver any such assurance.

Justice required that I have a neutral, detached party, such as a magistrate, review the Bureau's requests. At this point, I had repeatedly filed FOIAs to request copies of the accusations against me so I could know why I was being

treated this way by the Bureau. I simply had no idea what I could possibly have done or been accused of doing that would warrant such horrendous abuse as was being inflicted by the Bureau.

Also, at this time the Bureau had begun to hold up my license applications and to dismiss them, in my opinion, improperly, and the Bureau further refused to provide me any hearing on any of my applications as required by law. With the continued refusal of the Bureau to inform me of the charges against me, which was a matter of elemental fairness, or to provide me with any documents under FOIA, even after my filing suit in federal court, upon advice of counsel, I came to believe that my civil rights and rights of due process were being trampled upon.

Upon advice of counsel, I came to believe that administrative remedies before the Commission were pointless because the complaints were being handled by the same persons who were investigating me.

In response to a FOIA request, the Bureau provided the cover pages to six blind copies of the January 31, 1994 letter. These letters were sent to Pick, Christopher Killian (Carrier Communication), VanDeist, Cornelia Dray, Eddie Cooper (Fullerton School District) and Dr. Michael Steppe of Chino Hills Equine Clinic. I found this extremely alarming because of Pick's animosity to me. Killian is a competitor and cohort of Pick, who attended the July 1992 meeting. I was surprised at the Commission letters having been sent to VanDeist, Cornelia Dray and the Fullerton School District because all my dealings with them were legal, well documented and perfectly legitimate contractual relationships. I never succeeded in doing business with Dr. Steppe, never met with Dr. Steppe, nor had any personal contact with him. I had no idea why these people would have filed any complaint before the Bureau against me. **These four parties and others had been solicited by Pick, DeMarzo and others who were all present at that meeting in July 1992.**

That the charges against me are baseless and false will be clear upon the examination of the record by anyone with an open mind. This is where the questions raised by the Bureau involving Marc Sobel's licenses and Multiple M licenses are important. For the first time, we have an admission by the Bureau that they do not even have the names of the licensees correct. They have alleged that these licenses are held in my name as a "shill", or as a nominee. In truth and in fact, these licenses are held by Marc Sobel, who is an individual residing in California, and with whom I am personally acquainted. This is contrary to the Bureau's claim that Marc Sobel does not exist, or is my alter ego. Multiple M Enterprises, Inc. is solely owned by Vida Knapp. I have no interest in the corporation known as Multiple M Enterprises, Inc. or Vida Knapp. Vida Knapp is a resident of California. She is not, nor has ever been, my alter ego.

The purpose of my declaration here is to show that not only is the complaint false as to the Marc Sobel licenses and the Multiple M license, but to state unequivocally on the record that it is false as to the other respects as well. The upshot of this entire dispute with the Commission was that the Bureau issued a "Hearing Designation Order" based solely upon false accusations provided by or solicited by my business competitors.

At all times, I have sought to comply with lawful court process. When, at the request of the ALJ, a Joint Protective Order was entered into, I provided all documents and information which I was legally required to give. Also, I have fully participated and have fully litigated all of the issues in the HDO. Specifically, I remain ready, willing and able to provide all information in my custody and control in response to a lawfully drafted interrogatory or request for production of documents.

What I find to be truly extraordinary is that the Bureau's staff has now alleged in oral argument that without historical data regarding the construction and loading of my stations, that it is unable to determine whether my stations were duly

constructed or loaded. This is an extraordinary admission on their part because that information was never even requested in the original January 31, 1994 letter by the Bureau. In other words, the staff now has, in effect conceded, at least indirectly, with the position put forward by my attorneys, Brown & Schwaninger, that the January 31, 1994 letter could never have achieved its stated purpose of shedding light on the question of whether my stations were constructed or fully loaded. See Brown & Schwaninger's letter of April 7, 1994. It also shows that they have absolutely no evidence of any kind regarding this issue.

I believe that the conclusion can then be reached that the Bureau's very broad request for information was nothing more than a "fishing expedition" against me. The conclusion is inescapable that the Bureau's staff had formed an opinion a long time ago, based strictly upon accusations which were fomented and directed by competitors, that I was a "bad person" and should be driven from the radio business. Based on innuendos and accusations alone, I was condemned to the administrative equivalent of death row. I was offered essentially a choice of method of execution. I could turn over my customer list to the Bureau, where my competitors could obtain it, thus granting me a quick economic death, or I could resist the Bureau and the Bureau would then file an action to take away all of my licenses by means of an HDO, thus choosing a lingering economic death. It would base the HDO not on any substantive wrongdoing, but simply upon my refusal to grant the Bureau my confidential customer information. This was a classic Hobson's choice.

The above facts now explain why my customer list required ironclad protection. In my opinion, Pick, DeMarzo, Gigliotti or their associates exhibited a pattern of behavior under which once they discovered the identity of one of my customers, they would contact this customer and defame me with outrageous and untrue accusations, up to and including murder. Even if these competitors could not provide service (which was often), they could still, and would still have attempted to injure my business interests by convincing the customer to

discontinue my service or better still - file false allegations with the Bureau against me. This helped them because it weakened me financially so that they could better compete against me in other areas.

Such practices are wrongful in any civilized society, yet this was the standard operating procedure of the Picks, DeMarzo and Killian, who I believe filed these complaints with the Commission and induced others to file similar complaints against me.

Based on the above and all of the facts which I have stated herein, and upon advice of counsel, I came to believe that I was justified to postpone release of customer information until issuance of the Joint Protective Order.

Now that the Bureau has admitted that neither Marc Sobel nor Multiple M are my "alter ego", these facts show that this was not merely a minor procedural mistake on their part, instead, it is a devastating admission that their substantive case against me is without evidentiary support. It is also evidence that the HDO was very sloppily drafted and, I believe, improperly investigated (or perhaps not even investigated at all) and the case against me is clearly not thought out or even properly prepared. If the Bureau cannot be sure of even the ownership of a substantial number of licenses, it is reasonable to infer that other serious oversights have occurred. The Bureau's admission that these licenses should be removed from the HDO also supports my position that the entire case against me is false and meritless from beginning to end.

There is also attached to these moving papers a declaration by Mrs. Thompson, who heard Ms. Wypijewski make the offending statements regarding the Finder's Preference. Also, there is attached a declaration of Mr. Mullins who was Pick's former employee, who heard Pick and DeMarzo bragging about how they were going to destroy me. Furthermore, this latter declaration gives evidence of how Gerard Pick gave gifts to FCC staff members. and engaged in numerous communications with the staff. Additional discovery of the staff is necessary to

determine the full extent of these gifts. Also, Chuck Smith, a former Pick and DeMarzo employee, was present at Cal Western Termite and heard DeMarzo tell Cal West that I stole their license, cheated them, and that Cal Western should hire lawyers to get their license back. These two ex-employees have shed light on the true facts. Cal Western admits that DeMarzo talked with them, and said that they were told by their radio man to complain. Smith and Mullins show how DeMarzo induced Cal Western Termite to file this complaint (Smith's transcript attached).

A question arises as to where the Bureau received the erroneous information set forth in the HDO that I own the licenses that in fact belong to Marc Sobel. Also, this is true for the corporation Multiple M Enterprises, Inc. Where did the Bureau get the information that Marc Sobel was a non-existent person? Where did the Bureau get the information regarding Multiple M?

I believe that the Commission had an elementary and basic duty to investigate its case before it filed it. Didn't anyone at the Bureau have the foresight to call Marc Sobel to find out if he even existed?

At this date, I find it truly incredible that the Bureau has never even contacted me or my counsel regarding any of the allegations filed against me by Cornelia Dray, Eddie Cooper of the Fullerton School District, VanDeist, Cal Western Termite, BFI, or Dr. Steppe. Likewise, they have not discussed with me any other complaints, and indeed, there may be other complaints which are unknown to me. At no time have they ever asked for my side of the story before issuing the January 31, 1994 308(b) letter. Now the Bureau has made a motion to take all of my licenses without so much as a hearing on the false claim that I failed to answer one interrogatory (that I have, in fact, answered twice!).

The Bureau has made vague innuendos that I have somehow concealed information, yet they have produced no evidence of any kind to that effect. All they have shown is that my lawyers have responded to their January 31, 1994 letter in the form of a vigorous assertion of my constitutional rights, my rights

to due process and administrative fairness. All that happened, under advice of counsel, was an objection to an overbearing and questionable demand for information. I submit that I had good grounds to make my objections to the January 31, 1994 letter and that my lawyers' assertion of my rights is not evidence of bad character or unfitness to be a licensee, but is rather evidence that my lawyers decided to challenge an overreaching governmental inquiry into my affairs.

The purpose of the following is to respond to the Bureau's statements made in oral argument regarding how my records are kept. In the first place, I point out that the staff members of the Bureau are unqualified to testify or to introduce any evidence as to how private business people, such as myself, should keep or maintain business records. In particular, they are incompetent to testify as to "industry practices" due to lack of training and experience in private business,. Also, more to the point, "industry practices" are irrelevant as a standard for my particular record keeping practices. The Commission provides no rules or regulations as to what records need to be kept, nor in what form records should be kept. Also, there is a question of what is the "industry" in determining the standard. Against whom would you compare my operations? Nextel (a multibillion dollar company) or perhaps Motorola (the largest and most aggressive communications company in the world)? Merely thinking of these issues must give one cause to realize that the staff is totally unqualified to speak on the subject of industry practices or the keeping of records.

One final point. The Bureau staff stated repeatedly that they did not understand how I could stay in business and keep my records as I do. However, in making these arguments, they sound like the proverbial engineers who have determined, through calculations, that a bumblebee cannot fly. The bumblebee, not having studied aerodynamics still flies in blissful ignorance of the expert's judgment.

I have kept my records in the same manner for years, and I have amassed a large positive net worth. Also, I run a successful business. What records does the staff Gettysburg say I need to run my business more efficiently and why?

Subsequent events in this case indicate, I believe, that my interests were prejudiced unfairly by this investigation. I believe that selective leaking by the Bureau has continued during the conduction of this case. While I was negotiating the M.O.U. with the Bureau, it was clear that information regarding the negotiations were being leaked to prospective buyers. During the negotiations, Nextel seemed to have a direct pipeline, I believe, into the Commission. In response to information received from the Commission, they reduced the offer for my stations.

Since the Bureau has once again called for the ultimate sanction to be rendered against me in the Supplement, namely the loss of all my licenses, I believe that it is important that the ALJ understand the extreme seriousness of this sanction. Radio is both my career and my hobby. I have been involved in electronics and radio communications essentially all of my adult life. To lose these licenses would bankrupt me and leave me without employment, a business, or a career. I have used my best efforts to answer Interrogatory No. 4. If I had any further information or better information, I would have provided it long before this point. I point out that with the exception of certain historical data ,which I do not have, I have provided literally everything requested in this Interrogatory. I am genuinely at a loss to determine what information the Bureau wants in response to the Interrogatory. The Interrogatory required me to link a call sign with a customer, and a mobile count. This was done. I point out that I have not, nor do I wish to be seen as obstructing discovery in this case. I also point out that after the filing of my answer to this Interrogatory, the Bureau did not make any effort to "meet and confer", nor did the Bureau take any formal or informal steps to either clarify the information which it wanted, or to resolve any discovery dispute.

I understand that an issue raised by the ALJ and the staff is whether in light of my alleged failure to produce information, this case can go forward. I point out that the information and documents produced since the filing of the HDO, together with the answer to Interrogatory No. 4, and the other interrogatories collectively provide much more information regarding my licenses than were ever requested in the 308 (b) letter. The Bureau has had all of my customer information for nearly one year. They have had the information in Interrogatory No. 4 for almost five months. As of this date, the Bureau has submitted no evidence of any kind of any wrongdoing in the conduct of my affairs, nor have they linked a single impropriety to any license application. In summary, my resistance to the January 31, 1994 letter has in no way limited their ability to investigate my affairs. Their failure to produce any evidence of wrongdoing must therefore be held against the Bureau.

As can be seen, the Bureau's final pleadings indicate very strongly that this case is far more complicated than the Bureau has suggested, and that each of the issues must be discussed individually. As I have reviewed the HDO and all of the matters which have been actually presented against me, I note that there is absolutely no evidence of any kind that has been offered against me. I state unequivocally that all of the charges against me are false and groundless, and that I have acted responsibly and professionally to provide good service to radio customers for many years. I am a person of good character who was forced by the wrongful actions of the Bureau to fight, with all available resources, for his rights under the law.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Van Nuys, California on this 15th day of March, 1996.

JAMES A. KAY, JR.

LAW OFFICES
LEWIS H. GOLDMAN, P. C.
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1850 M STREET, N. W.
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TELEPHONE
(202) 659-8300

July 27, 1992

Mr. Charles R. Wells
Mobile U.H.F., Inc.
11892 Cardinal Circle
Garden Grove, California 92643

BY FACSIMILE

Dear Chuck:

It was very nice to have that unexpected meeting with you on Friday afternoon to discuss the James Ray situation. I appreciate your coming all the way from Orange County, particularly when you have indicated that you have no direct interest in the matter yourself.

I think that the participation of the other dealers, including perhaps those who did not attend the luncheon, would be very helpful, not only in spreading the costs but in providing a united front which would gather information against the adversary that I could use in presenting the case to the Commission.

I hope that Alan Kaitz will be able to organize the group into some semblance of order so that we can proceed very quickly. If not, then I will simply limit my efforts to being on behalf of Jim Doering.

Sincerely,

Lew

Lewis H. Goldman

AFFIDAVIT

I, Gail Thompson, am the wife of Ralph Thompson. Ralph was licensed to operate Business Radio Service--Conventional station WIH275. One day in April, 1994, I received a telephone call from a woman who identified herself as Anne Marie Wypijewski of the Federal Communications Commission. Ms. Wypijewski called regarding my husband's station which was target of a Finder's Preference Request filed by James A. Kay, Jr. My husband had written a letter to the FCC on April 5, 1994, opposing the Finder's Preference Request.

Ms. Wypijewski said that the license for the station was going to be cancelled regardless of the Finder's Preference Request. She indicated that she was trying to help, and she wasn't cancelling the license just to take it away. She informed me that once the license cancelled, it would be "up for grabs" and anyone, including my husband, could apply for it. She made it sound like it would not be very long before all this happened.

Ms. Wypijewski called again on Friday, April 29, 1994 and left a message on our answering machine. I did not have an opportunity to return her call.

I declare, under penalty of perjury, that the foregoing statement is true and correct.

Gail Thompson

Dated: 12-12-94

DECLARATION OF WILLIAM I. MULLINS

I, WILLIAM I. MULLINS, state and declare:

1. I am an adult over the age of 18 years. My present residence address is 5145 West 134th Place, Hawthorne, California 90250. I have lived at that location for 27 years.

2. The following statements are made of my own personal knowledge.

3. From the beginning of 1992 through January, 1995, I sporadically used the services of CCS in the operation of my own businesses. I had significant direct contact with the company.

4. From approximately June, 1994 to December, 1994, I worked for the business known as CCS as a salesperson. My job duties included sales of two-way radio equipment, two-way radios systems, and marketing of two-way radio equipment and market research. While working as a salesperson, I spent most of the time working at the business address of 5310 West Century Boulevard, Los Angeles, California 90045. During the time that I worked for CCS, "CCS" meant at various times, I cannot recall, Computer Consultants & Systems or Communications Consultants & Systems. In recent times, the same company used the name Century Communications Systems.

5. I was hired to work for CCS by GERARD PICK and HAROLD PICK. I was supervised primarily by HAROLD PICK, and had only incidental contact with GERARD PICK.

6. During the course of my employment with CCS, it became quite apparent that HAROLD PICK, GERARD PICK and ANN PICK, all had considerable animosity towards a person they identified as JAMES A. KAY, JR, (hereinafter "KAY"). Even prior to my employment, when I was dealing with CCS in the capacity as a customer, HAROLD PICK, in particular, spoke to me frequently concerning KAY.

7. Prior to working for CCS, in 1993, I generally would have contact with HAROLD PICK fifteen times on average in the course of a month. In each and every instance, HAROLD PICK would discuss at length KAY with me. He generally would ask me to help him to interfere with KAY's business operations. Specifically, he asked me to speak to each of my customers and be sure that I stated that KAY was a "crook", "criminal", and was someone not to be trusted in business.

8. I do not recall any specific dates or customers, but during 1993, while I was present at the CCS business located at 5310 West Century Boulevard, in my presence, HAROLD PICK repeatedly spoke to customers who came in off the street concerning the character of KAY. While I was present, PICK would, as a matter of course, inquire of TWO-WAY RADIO customers, who provided their two-way radio repeater service. If the customers responded that such service was provided by LUCKY'S TWO-WAY RADIO or SOUTHLAND COMMUNICATIONS, HAROLD PICK would immediately warn the customer that they were dealing with a dishonest person in KAY, and that "they better watch their back".